

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION  
DOCKET NO. 3:13cv\_\_\_\_\_  
3:12-cr-00097-MOC

LAVONTE LAMONT HALLMAN, )  
Petitioner, )  
Vs. ) ORDER  
UNITED STATES OF AMERICA, )  
Respondent. )

**THIS MATTER** is before the court on the *pro se* “Letter” (#83) of defendant, which was mailed to chambers, even though this action is on appeal to Court of Appeals for the Fourth Circuit. Initial review of such Letter reveals that defendant is upset with the sentence he received and states, in relevant part, as follows:

Due to the fact that I was already offered a [lesser] plea by the state and the fact that the federal court[] agrees that this case falls outside the heartland of Hobbs Act prosecution I feel that the tenth amendment was violated and the cruel and unusual clause ....

Letter (#83) at 1. In pertinent part, Rule 37, Federal Rules of Criminal Procedure, provides, as follows:

**(a) Relief Pending Appeal.** If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
  - (2) deny the motion; or

- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

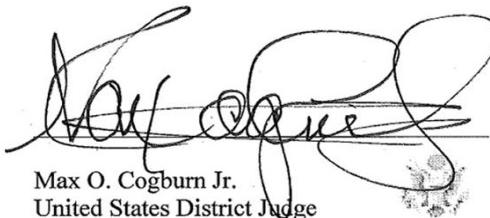
Fed.R.Crim.P. 37(a).

Absent extraordinary circumstances, a defendant may not seek collateral relief where, as here, his direct appeal is pending inasmuch as the outcome of the direct appeal could end the need for habeas relief. McIver v. United States, 307 F.3d 1327, 1332 n. 2 (11th Cir.2002) (noting that “collateral claims should not be entertained while a direct appeal is pending” because the petitioner may obtain on direct review relief of a nature which renders moot the issues that he also is raising on collateral review); Welsh v. United States, 404 F.2d 333 (5th Cir.1968) (“A motion to vacate sentence under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, inasmuch as the disposition of the appeal may render the motion moot.”). Having considered the pending motion in light of Rule 37 and prevailing case law, the court will dismiss the petition without prejudice as premature.

## **ORDER**

**IT IS, THEREFORE, ORDERED** that the “Letter” (#83), deemed to be a Motion to Vacate, is **DENIED WITHOUT PREJUDICE** as premature.

Signed: November 14, 2013



Max O. Cogburn Jr.  
United States District Judge